Restricting minimum wage protection on social care 'sleep in' shifts

Consider this: an employer binds a worker to attend their place of work, on time and for a specific duration, yet permits them to sleep throughout the shift unless their services are required. Does the employer have a statutory duty to pay at least as much as the national minimum wage for all the hours of the shift? At issue in *Royal Mencap Society v Tomlinson-Blake and Shannon v Rampersad* [2018] EWCA Civ 1641; [2018] 7 WLUK 321 was the scope of minimum wage protection where workers were permitted to sleep during overnight shifts in which they had the care of vulnerable adults. At stake was an estimated £400 million liability that social care employers feared they may carry for an underpayment of wages to workers on so-called "sleep-ins".

The National Minimum Wage Act 1998 (NMWA) at s.1 provides workers with a right to be paid at least as much as the relevant national minimum wage rate within a pay reference period. Section 2 NMWA gives the Secretary of State powers to make regulations about the circumstances and time for which a worker is to be treated as working or not. However, s.2(8) limits those powers such that no regulations shall be made which treat the same circumstances differently by reason of different sectors of employment or occupations.

The Court of Appeal's judgment in *Mencap* was delivered by Lord Justice Underhill. A "sleep-in" was defined by the Court as a worker's contractual obligation "to spend the night at or near the workplace […] on the basis they are expected to sleep for all or most of the period but may be woken if required to undertake some specific activity" (at [6]). Underhill L.J. began by identifying that it was commonplace in the care sector for agreements to be made in which workers "sleep-in" overnight at premises where vulnerable people reside. Typically, in return for a fixed payment, care workers on "sleep-ins" could be called on if assistance was required, but they otherwise had no duties. The judgment sought to establish the correct approach to sleep-in cases generally, before turning to the particulars of the appeals relating to care workers Claire Tomlinson-Blake and John Shannon.

The EAT had previously applied a multi-factorial test to determine if a worker was "working" on such a "sleep-in" shift (reported as *Focus Care Agency v Roberts* [2017] ICR 1186). That test, if answered in the affirmative, established minimum wage obligations for the shift in full. The Court of Appeal in *Mencap* overturned the approach. It replaced the need to ask whether a worker is "working", with a bright-line test as to whether a worker is "expected to sleep" for all or most of their shift. Consequently, workers who are "expected to

sleep" are deemed to fall under parts of the national minimum wage regulations known as the availability regulations. To the collective relief of social care employers, entitlement to pay protection was therefore limited to periods in which workers are "awake for the purposes of working" and "required to be available".

Since the introduction of the UK's statutory minimum wage scheme there have been three versions of the availability regulations. Each version uses similar wording to define "availability" and ensure that workers are subject to minimum wage protection during "available" time. The core requirements are that an "available" worker is "at or near" a place of work, which is not the workers' home, except if the worker "by arrangement sleeps", in which case they are considered to be available only while they are "awake for the purposes of working". Finding the correct interpretation of these regulations in respect of "sleep-ins" was at the heart of deliberations in *Mencap*.

Underhill L.J. noted that as a matter of statutory duty at s.5(1) NWMA, the Secretary of State was required to consult with the Low Pay Commission before drafting the first minimum wage regulations. Section 5(2) NMWA required the Low Pay Commission to publish recommendations and in its 1998 report, recommendation 12 related to situations in which workers were paid to sleep:

> "For hours when workers are paid to sleep on the work premises, workers and employers should agree their allowances as they do now. But workers should be entitled to National Minimum Wage for all times when they are awake and required to be available for work (para 4.34)". Para 4.34 explained, "Certain workers, such as those who are required to be on call and sleep on their employer's premises (eg in residential homes or youth hostels) need special treatment".

Section 5(4) NMWA required that in the event of the Secretary of State deciding not to follow the recommendations of the Low Pay Commission, he or she must lay an explanatory report before Parliament. Since there was no report laid before Parliament, the Court of Appeal concluded that these recommendations and their corresponding explanatory text were of "fundamental importance" to finding the correct interpretative approach in *Mencap* (at [13]).

Underhill L.J. stated that, "the Commission deals expressly with the case of workers who sleep-in in 'residential homes' […] which are essentially the kinds of case with which we are

concerned" (at [13]). He stressed it was, "of course obvious" that the availability regulations should apply in such cases (at [43]). The test required therefore, was one establishing if workers were "expected to sleep" and was made out where they are typically not woken from sleep or spend only a minority of their shift awake for the purpose of undertaking specific tasks. In these situations, the availability regulations apply directly (regulation 31 or regulation 32, National Minimum Wage Regulations 2015).

Yet, in a prior suite of cases, the EAT and Court of Appeal had found that shifts in which workers were permitted to sleep did not fall within the scope of "availability" because the workers were deemed to be "working" throughout. In *British Nursing Association v Inland Revenue* [2002] EWCA Civ 494; [2002] 3 WLUK 773, telephone call handlers working overnight from their own homes were permitted to sleep during periods in which there were no telephone calls to be answered. In determining their minimum wage entitlements, the Court of Appeal asserted that availability regulations provided entitlements "in addition" to protection available during time when workers were "working" (at [15]). Therefore, the availability regulations were to have no relevance if it could first be established that workers were "working". To determine the question of "work" in *British Nursing*, the reasoning of the Court hypothetically transposed the workers' activities into an office environment, where it became plainly evident that waiting between telephone calls constituted "work". Consequently, availability regulations did not apply and employer obligations to pay at least as much as the relevant minimum wage rate adhered to all hours of the overnight shift, even if workers were sleeping.

Following *British Nursing,* Underhill L.J. in *Mencap* recognised that the direct application of the availability regulations to sleep-in situations was not logically the "first step" and it was "strictly necessary to ask first" whether a worker was "working" because the availability regulations apply only in the negative (at [43]). However, the reasoning of Underhill L.J. then took a curious, although determinative, turn. He insisted that the question of whether or not a worker is "working" is:

> "for practical purposes an unnecessarily elaborate approach. The self-evident intention of the relevant provisions is to deal comprehensively with the position of sleep-in workers" (at [43]).

Although Underhill L.J. confirmed the decision in *British Nursing,* he stated that its reasoning and substance was not decisive in situations where "the essence of the arrangement is that the

worker is expected to sleep" (at [57]). He then addressed *Scottbridge Construction v Wright* [2003] S.C.520; [2002] 10 WLUK 721, an authoritative case in which a security guard who had been expected to sleep was found to be "working". Mr Wright had few duties to perform and was permitted to sleep for 10 hours of his 14-hour shift, yet the availability regulations were found surplus to requirements because he was "working" throughout the shift. His lack of activity had no bearing on the question of "work" since his duty was "to attend the premises" (at [2]) and be "in attendance" (at [11]). Minimum wage liabilities therefore arose throughout the whole of his overnight shift. Underhill L.J. recognised that "the core facts [in *Scottbridge*] were indistinguishable from those of the kinds of case with which we are concerned" yet also asserted that *Scottbridge* could not determine issues arising in the care sector (at [79]). This, he said, was because the availability regulations, read together with the recommendations of the Low Pay Commission, "require the case of a sleeper in in a residential home to be treated as a case of availability for work and not one of actual work" (at [79]).

The authority of *British Nursing* and *Scottbridge* had produced mixed results where previously considered by the EAT. *Anderson v Jarvis Hotels* EATS/0062/05/RN; [2006] 5 WLUK 771 was one of the earliest cases. Notably, this was not a minimum wage claim because it considered whether the terms of a worker's contract entitled him to contractual pay during sleep-over nightshifts. In asking whether Anderson was "working", the EAT said that it was wrong to look for evidence of specific activity. Jarvis Hotels needed two employees on site at all times for health and safety and fire regulation purposes and although Anderson's home was close to his workplace, it would not suffice for him to be on-call nearby. Anderson was required *at* the hotel because it was only by being present on the premises that he met the needs of his employer. Accordingly, attendance overnight was his "work", for which he was entitled to contractual pay.

In *Rossiter v Burrow Down Support Services* UKEAT/0592/07/LA; [2008] 6 WLUK 615, a night-sleeper was required to remain on-site at a residential home for security purposes. He was able to sleep for nine of the ten hours of his shift and paid a small flat rate that was topped up by extra pay when he was woken as required. The EAT, following *British Nursing* and *Scottbridge,* found that throughout his sleep-in shift, Mr Rossiter was "working" for the purposes of minimum wage protection since he was required to deal with anything untoward that might happen during the night and was therefore entitled to minimum wage rates even while he was permitted to sleep.

In *South Manchester Abbeyfield Society v Hopkins* UKEAT/0079/10/ZT; [2011] I.C.R. 254, the EAT considered the situation of a worker in a residential home who worked day-shifts as well as night-shifts, in which she was required to be on-call, on-site, and was permitted to sleep. The EAT distinguished her situation from the facts in *British Nursing,* in *Scottbridge* and in *Burrow Down,* finding it was material that Hopkins was in receipt of an attendance allowance for being on-call at night in addition to her wages for day-time work. In this situation, Hopkins was "on-call" rather than "working" during the sleep-in and the availability regulations applied. The case of *Whittlestone v BJP Homesupport* UKEAT/0128/13/BA; [2014] I.C.R. 275 concerned a sleep-in shift at the personal home of two adults with learning disabilities. Whittlestone was required to "be there" just in case her assistance was needed during the night (at [59]). Applying its earlier decisions in *Anderson* and in *Burrow Down,* the EAT found her sleep-ins were "work" for the purposes of minimum wage protection and that the availability regulations were irrelevant.

Yet in *Mencap,* Underhill L.J. went so far as to suggest that in light of the Low Pay Commission's recommendations it was "not open" to a Court to decide that a worker on a sleep-in shift was "working" (at [80]). Further affirming this position, he found that *Burrow Down* was wrongly decided because the facts concerned a "residential home" yet the EAT failed to consider those facts alongside the recommendations of the Low Pay Commission. As his Lordship noted, the implication was that the ten EAT cases subsequent to *Burrow Down* that drew on its reasoning in respect of "sleep-ins", could be "simply put to one side" (at [84]).

This position on sleep-in shifts in general was determinative of the Court's treatment of the individual appeals before it. At first instance in *Mencap,* the ET had found Claire Tomlinson-Blake was caring for two men needing 24-hour assistance, at a privately-owned property which was not a care home, that she was obliged to remain on-site, to "keep a listening ear out during the night in case her support is needed" and "intervene where necessary". The ET noted her presence at the house enabled her employer "to comply with the legal obligation placed upon it, to provide an appropriate level of care for the service users". Furthermore:

> "… the onus was constantly upon her to use her professional judgement and to use the detailed knowledge that she had of the needs of these residents to decide when she should intervene in order to meet their needs and when she should not in order to respect their

> right to privacy and autonomy. That epitomises her role as a carer."
> (as quoted in *Focus Care Agency* at [52]).

Absent the first step question of "work", Underhill L.J. did not regard the need for workers to maintain a "listening ear" as anything more than axiomatic, since it was merely "what they are there for" (at [94]). Accordingly, Underhill L.J. did not distinguish the situation of Claire Tomlinson-Blake from the Court of Appeal's general definition of a sleep-in. No consideration was given to the issue of lone working, or to levels of responsibility for vulnerable adults, to the need of employers to meet legal obligations, to the start-times or duration of sleep-in shifts, or indeed to the substance of care work.

If the question of "work" had been asked for Claire Tomlinson-Blake, adhering to the approach taken in *British Nursing* may have proven illuminating. Accordingly, deliberation over whether or not Tomlinson-Blake was "working" would transpose the sleep-in shift out of the home of her service-users and into a different location, close-by enough for her to be woken for the purposes of work as required (note the availability regulations apply where a worker "by arrangement sleeps at *or near* a place of work"). In so doing, it would become evident that Tomlinson-Blake could not have fulfilled the needs of her employer, nor could she have provided the care that was necessary and integral to her job, without being physically present in the same house as those for whom she had the care. As per *British Nursing* and *Anderson,* this suggests that Tomlinson-Blake was "working".

As regards its treatment of facts relating to John Shannon, the Court of Appeal in *Mencap* also found "availability for work" rather than "actual work". Shannon's employer provided him with live-in accommodation at a care home and required his attendance as an on-call night-care assistant from 10pm – 7am. Shannon was able to sleep during those hours but was expected to respond to any request for assistance. His representative, Mr Casper Glyn Q.C. submitted that the question of work called for recognition that the overnight presence of the worker was needed to meet the employers' staffing obligations as per Regulation 18, Health and Social Care Act 2008 (Regulated Activities) Regulations 2014. However, overlooking *Anderson,* Underhill L.J. associated this point with the decisions post-*Burrow Down* and could "not see that it assists on the question of whether he was actually working or available for work" (at [99]).

The *Mencap* decision raises the potential that in social care, individual parties are permitted to reach agreements regarding sleep-in shifts in which workers effectively contract-out of statutory wage protection. Yet, it is clear from section 2(8) NMWA that the Secretary of State had no power by which to give special treatment to "different sectors of employment" or "persons of different occupations". This suggests that the availability regulations ought not to be applied to residential care workers, in the absence of a question of "work", simply because they are residential care workers. Notwithstanding this concern, an elasticity of the phrase "residential home" should not be assumed. Workers such as Tomlinson-Blake assist people with disabilities to live independently, in private homes, supporting them to make autonomous choices in their local communities and to decide for themselves over issues such as what time they go to bed at night or how they wish to spend their time. Working alone, in the absence of managerial oversight, a single worker will attend to the needs of multiple vulnerable adults and support them as individuals.

The "expectation of sleep" and ability to be "woken" are key elements of the Court of Appeals' definition of a "sleep-in". These are phrases novel in the context of prior case law and missing from the relevant regulations. They are difficult to square with the organisation of contemporary social care, now largely delivered in community and domestic settings which are very different from the institutional, public sector services of decades past. It is interesting to consider if a worker in a private home may be "woken if required" where there is no agent of the employer to wake her or to decide upon the circumstance in which her response is required? Similarly, should a worker be reasonably understood as "expected to sleep" if she is "constantly exercising professional judgement" throughout a sleep-in (as per Tomlinson-Blake) and thus denied full minimum wage protection while also contractually bound to fulfil the statutory duties of her employer? It appears that the Court of Appeal's novel definition of a sleep-in sits awkwardly with the facts of the appeals, with prior legal wording and with the contemporary organisation of social care. Consequently, its disposal of the first step question as to whether a worker is "working", and its apparent endorsement of special treatment in social care, seem unlikely to withstand the test of time. At the time of writing, applications for leave to appeal are under consideration by the Supreme Court.

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